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Supreme Court of the United States

October Term 1955

No. 17

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

—against—

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENTS, RKO THEATRES, INC., and RKO FILM BOOKING CORPORATION, In Opposition

O'BRIEN, DRISCOLL & RAFTERY
Attorneys for Respondents, RKO Theatres, Inc. and RKO Film Booking Corp.

ARTHUR F. DRISCOLL
EDWARD C. RAFTERY
GEORGE A. RAFTERY
of Counsel

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exhibition of those motion pictures. Many of the findings of fact and conclusions have nothing to do with the issue in this case.

General findings of violation of the anti-trust laws in the *Paramount* case are insufficient to impose liability in the present case unless plaintiffs have introduced evidence to relate those findings to the issue in the present case. See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *Fanchon & Marco, Inc.* v. *Paramount Pictures, Inc.*, 133 F. Supp. 839, 845, 846 (S. D. N. Y. 1955); *Fifth and Walnut* v. *Loew's, Inc.*, 176 F. 2d 587, 593 (2d Cir. 1949); *20th C. Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 859 (8th Cir. 1952). The plaintiffs have not supplied the deficiency by directing attention to any parts of the record in the *Paramount* case that show that the issue involved in this case in this area was adjudicated, *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir. 1951).

Plaintiffs, however, specifically rely upon finding of fact No. 154(d)* which would seem to have some relationship,

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* "154(d). In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner, and half of Universal. Accordingly, the showing that 85% of Loew's theatres are in competition with theatres of other defendants is misleading and may properly be reduced by the exclusion of its New York neighborhood theatres. If this is done, it would give Loew a percentage of approximately 42% of its theatres in competition with other defendants in cities over 100,000."

at least so far as the first sentence of the finding is concerned, to the issue in the present case. This sentence reads as follows:

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition *between them* in obtaining pictures." (italics supplied)

Conclusion of law No. 16 in the *Paramount* case reads as follows:

> "Loew's, Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in New York City, and by the dividing of that market between itself and RKO."

While the findings may perhaps constitute evidence (on which point the Court finds it unnecessary to pass) that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City, the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called "independents" such as the plaintiffs in the present case.

Whatever may have been the situation as between Loew's and RKO with reference to the exhibition of their products and the products of other major distributors, the evidence in this case clearly indicates that during the period involved in the action, there was no arbitrary allocation as between the circuits of the pictures of the plaintiffs or that

the defendants excluded the pictures of the plaintiffs. It does not necessarily follow from the fact that there had been an allocation of the major distributors who were defendants in the *Paramount* case that the product of all other independent distributors of motion pictures was allocated or that there was no competition for the product of these independent distributors. Likewise, the plaintiffs have not complained that their product was "divided" or allocated in any particular way by and between the present defendants. The evidence shows clearly that the plaintiffs were not excluded from this market. Under these circumstances, the findings of fact and conclusions of law in the *Paramount* case are insufficient in and of themselves to establish exclusion by any combination and conspiracy. The Paramount case did not involve the issue as to whether plaintiffs were prevented from licensing their pictures on an equal competitive basis to the defendants. Since this issue was not in that case, the decree in that case does not constitute prima facie evidence of any such ultimate fact.

In the absence of proof of actual combination or conspiracy to deprive the plaintiffs of an equal competitive opportunity, plaintiffs would have the Court draw the conclusion that there was such combination or conspiracy by a comparison of the ratio of the income received by the plaintiffs from the subsequent run theatres in New York to the income received nationally as compared to the ratio of the income received by the eight major distributors from the subsequent run theatres in New York to the income which these distributors received nationally. In other words, the plaintiffs contend that the income which they received in the subsequent run theatres in New York, in comparison with the income received nationally and as contrasted with the similar figures for the eight major distributors, would lead to the conclusion that there had been a combination or conspiracy between the defendants

to exclude them from licensing their pictures in the subsequent run theatres in New York on an equal competitive basis. Plaintiffs base this upon the hypothesis that if they did not receive for their pictures as large a proportion of income from the New York subsequent run theatres compared to their national gross income, as did the major distributors, it would show that they had been discriminated against in New York. This argument presumes, of course, that they were not discriminated against on a national basis.

Plaintiffs rely upon certain statistical studies made by them. These are combined primarily in an exhibit (Ex. 10) which sets forth two ratios prepared in part from answers to interrogatories by the defendants, including those defendants against whom the action has been discontinued. Exhibit 10 is a chart which reads:

"Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental Less such Subsequent Run Rental" *

"For all Eagle-Lion Product for Seasons 1946-50 (196 Features)"	"For Representative Product of 8 Major Distributors for Seasons 1946-50 (96 Features)"
6.4%	8.9%

The 96 representative product pictures of the eight distributors (all defendants in *United States* v. *Paramount*) were picked as follows: all pictures for each distributor for each of the four motion picture years from September 1, 1946 through August 31, 1950 were put in 32 separate lists in order of national rental. Then three median rentals were selected from each list: (1) the median rental for the entire

* Subsequent run rental, as used in Exhibit 10, includes that from all theatres except the 40 odd first run. It is not limited to rental from the defendants' theatres.

list, (2) that from the top quarter of the pictures, and (3) that from the lowest quarter of the pictures.

The plaintiffs have used the difference in ratios between 6.4% and 8.9%, which is 2.5%, to calculate that by reason of discriminatory practices in the metropolitan New York area, they lost at least $417,000 in net rentals on the films distributed through the four motion picture years in question. They arrived at this sum by taking 2.5% of the difference between their total domestic gross film rentals and their New York metropolitan area neighborhood theatre gross film rentals. The resulting figure of $919,000 was reduced by subtracting a sum which represented the average share (54.6%) of the gross film rental that went to the producer. (Apparently no allowance has been made for any of the other expenses usually incident to the earning of the film rentals.)

The purpose of using ratios instead of dollar amounts to show the discriminatory effect was, as counsel for plaintiffs explained it, because the pictures of the eight major distributors "all grossed, on the average, substantially more per picture nationally than Eagle Lion did."

This chart may, on the surface, seem to be persuasive for the point contended for by the plaintiffs. However, like all statistical studies, it is necessary to see whether there has been any statistical fallacy inherent in the statistical method used. One of the most insidious of statistical fallacies is the drawing of averages from a body of statistical data which is not comparable in kind or quality.*

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* "In order for a comparison to yield a meaningful, logical and significant result, the two quantities compared must be of the same quality or kind and must be stated in identical or comparable units. In other words, the variables compared must differ in *quantity only* as measured in *identical units*." Blair, *Elementary Statistics* (Henry Holt and Company, 1944) p. 42.

Appendix A

There is no more insidiously persuasive, and at the same time unreliable, type of evidence than that produced by taking a group of non-comparable figures, averaging them, and then attempting to draw a conclusion from that average.* An analysis of the underlying data and of the problem sought to be solved must precede any statistical approach. Therefore, any good statistical analysis would seek to ascertain whether the averages, when found, would be constant throughout the run of the data, or whether the averages were the result of particular factors in the data. That is why a plotted curve is frequently a better expression of average than a mere statement of an arithmetical average of a total of figures.** If the averages are not constant through the run of the data, it becomes important to ascertain what factors influenced the change in the averages.

An analysis of the data submitted in support of plaintiffs' Exhibit 10 shows that the conclusion of the plaintiffs that their pictures did poorer proportionately in the New York area, when compared to the national figures, than did the defendants' pictures, was a conclusion which was not true as to all pictures. A plotted curve would show that the ratio varied with the drawing power of the picture as evidenced by the national film rentals.

Thus, if we break down the ratios relied on by the plaintiffs into similar ratios which compare all Eagle Lion films which received national rental of $500,000 or less with the

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* Such as saying that if 51% of the population of the United States is male and 49% is female, an average American is 51% male and 49% female, i.e., an hermaphrodite.

** In the field of statistical analysis, this is called "Regression", which is a comparison between two or more variables. "It ferrets out and expresses in clear, measureable terms the hidden and inner meanings of great masses of numbers which otherwise would remain unknown." Blair, *op. cit.* p. 230.

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representative pictures of the major distributors which also received a national rental of $500,000 or less, and then similarly compare the ratios of pictures which received national rental of over $500,000, we get the following result:

Ratio of Subsequent Run Rental from Metropolitan New York to National Film Rental, less such Subsequent Run Rental

	Eagle Lion	Eight Major Distributors
For pictures having national rental of less than $500,000	6.2%	5.9%
For pictures having national rental of over $500,000	6.7%	9.2%
For entire product	6.4%	8.9%

On pictures which had a national rental of $500,000 or less, it appears that Eagle Lion did as well as or even slightly better than the eight major distributors. It is only when we come to pictures which had a national revenue of over $500,000 that a marked disparity begins, and it is this disparity in these pictures having this greater national revenue which leads to the difference in ratios for the entire product upon which plaintiffs rely as proof of a conspiracy.

The conclusion which follows from these figures thus broken down must be that Eagle Lion did as well as the eight major distributors in pictures which grossed nationally less than $500,000, and that the eight major distributors had proportionately a greater revenue in the New York area than they did nationally only in those pictures which had a national revenue of over $500,000. We should, therefore, examine the particular pictures which grossed nationally over $500,000 to see whether an inference can be drawn

that the disparity evidenced by these ratios was the result of a deprivation of equal competitive conditions from Eagle Lion, or whether it was due to other causes.

Of the 195 pictures distributed by the plaintiffs, only 18, or less than 10%, had gross national revenues of more than $500,000 while 64% of the representative pictures of the eight major distributors had revenues in excess of $500,000. Only seven of the pictures of the plaintiffs had gross national revenues in excess of $1,000,000 (and only one over $2,000,000) whereas 40 of the 96 representative pictures of the eight major distributors had gross national revenues in excess of $1,000,000, of which 18 were in excess of $2,000,000 and eight in excess of $3,000,000.

Boiling down all the statistics produced by the parties, it comes to this: 18 pictures of the plaintiffs which grossed more than $500,000 nationally did not do as well proportionately in the metropolitan New York area, as compared to what they did nationally, as the pictures of the eight major distributors that grossed more than $500,000 nationally. Was this difference due to a deprivation of an equal competitive opportunity for the plaintiffs?

All 18 of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing. This is certainly not proof of exclusion or lack of a competitive opportunity. Nor was there any proof that these pictures were entitled to a better place on the circuits.

Is the fact that these pictures did not do as well in New York as they did nationally, even though they were displayed in the circuits, proof of lack of a competitive opportunity? The fact that they did not earn as much in New York as they did proportionately in the rest of the Country is not persuasive proof that there was discrimination

against them. We must remember that we are comparing pictures of the plaintiffs which had a low national gross with pictures of the defendants which averaged nationally many times that of the pictures of the plaintiffs. We are considering two different classes of merchandise—one of a moderate grade and the other of a much higher grade—if we take their reception nationally as proof of their real worth, which is what the plaintiffs have done in using the national figures as an adequate basis of comparison.

Plaintiffs' argument would presuppose that any such merchandise, no matter what its grade, would do proportionately as well in New York as it does nationally. The economic facts of life show how fallacious is this contention. The fact that there are more Cadillacs per capita in New York, or mink coats per capita in New York, than in the Country as a whole does not establish that there is a conspiracy in New York against cheaper cars or cheaper furs. It is a consequence of the fact that the per capital wealth in the metropolitan New York area is greater than in the Country as a whole and that, therefore, there is a better market at a higher profit in that area for sales of expensive merchandise than in the Country as a whole. By the same token, the cost of living in New York is greater than in the Country as a whole, an economic fact of life which is recognized by most employers and most businesses —except, we may say parenthetically, by Congress in fixing salaries.*

Furthermore, the fact that a picture did better or worse in the Country as a whole than it did in New York is not proof that it was discriminated against in New York or

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* However, in the judicial system of the State of New York, this economic fact of life is recognized, for the State Supreme Court Judges in the metropolitan area receive a salary which is $5,000 a year higher than the Supreme Court Judges in other parts of the State.

that it suffered lack of a competitive opportunity in New York. New York, with its multitude of theatres and the variety of films offered to people within easy reach of a number of theatres, may well have a theatre-going population which is more discriminating in its choice of pictures than other cities or towns where the variety of theatres and films is much less in proportion to the population; and thus a good picture may do better proportionately in New York than it does in the rest of the Country where there is not the same degree of choice available. Thus, the evidence was that the success of a picture in New York depends to a great extent upon whether it has had a first Broadway run and upon the reception accorded to the picture by the critics and that this is not comparably true in other parts of the Country.*

One test as to whether the reception of plaintiffs' films in the New York metropolitan area was due to a conspiracy

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* Mr. Youngstein, who had been in charge of exploitation, advertising and publicity of the Eagle Lion films from 1946 until May of 1949, was asked the following question by the Court and gave the following answer:

"Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York?

"A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you have blanketed the City alone. That is the entire metropolitan territory. The newspapers have that importance.

"The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that received terrible reviews in New York, pictures which I would say would do much better outside of New York than in New York."

of the defendants or whether it was due to the quality of the films is the reception the films had from an independent exhibitor in this area. The defendants offered the testimony of Russell Downing, the president and managing director of Radio City Music Hall, a large and representative motion picture theatre which was not in any way affiliated with, or connected with any producer or distributor. Mr. Downing testified:

> ". . . we try to avoid in the Music Hall—and I feel the Music Hall in a sense is no different from any other theatres in the area—we try to avoid playing pictures that people don't want. It is our job to find entertainment they want and we want pictures they will patronize."

His testimony established that out of the 195 Eagle Lion pictures, only 4 were submitted by Eagle Lion to Radio City Music Hall for screening and consideration, and that even these pictures were not accepted because, in the opinion of the witness, they did not measure up to the standards of the quality required by the Music Hall. No Eagle Lion pictures were shown there in this four year period although each of the eight major distributors had some of their pictures exhibited at that theatre during the period in question.

Although practically all of the films distributed by the plaintiffs were inferior in quality and drawing power to those distributed by the major distributors, the difference in net returns only became markedly apparent in those films which grossed nationally more than $500,000. This is evident when we see that 97 of the 195 pictures distributed by plaintiffs had national film rentals of less than $100,000. Included in those pictures were re-issue pictures

of an antiquity which makes them almost part of the folklore of the cinema.*

But when we come to pictures which grossed nationally more than $500,000, we find that this disparity in quality and drawing power still continued and, in the circumstances, it is not surprising that the ratio from the display of these pictures in the metropolitan New York area by the eight major distributors was greater than that of the plaintiffs. Plaintiffs' contention seems to be that they were entitled to derive from the New York metropolitan area film rentals bearing a ratio not less than the corresponding ratio for the eight major distributors. It must be kept in mind that the Sherman Act does not entitle any person to any particular part of a market. It does no more than guarantee a right to compete equally for so much of the market as it can capture and hold by legitimate business methods and the providing of merchandise which the customer will take. See *Interborough News Co.* v. *Curtis Publishing Co., et al.*, 127 F. Supp. 286, at 297 (S. D. N. Y. 1954), aff'd 225 F. 2d 289 (C. A. 2, 1955).

Plaintiffs also urge that when defendants exhibited Eagle Lion Films, they did so only on discriminatory terms or after long delays. No evidence was introduced that any of the terms offered or agreed upon where the result of any conferences, agreements, or understandings between

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* Such as the following pictures which, in the four years involved in this action, had the following gross national revenue:

"Getting Gertie's Garter"	$17,400
"Up In Mabel's Room"	17,000
"Twin Beds"	15,600
"Tillie's Romance"	13,400

Included in the list were also such pictures as "Cattle Queen" which had a national gross revenue in this period of $2,800 and "Weaker Sex" which had a national gross revenue of $7,300.

the defendants, or were the direct result of any illegal combination or conspiracy. At one point plaintiffs stated that they had no objection to their treatment on any individual film. But at other times, they referred to the terms which they received on individual films as indicative of what they considered the illegal combination or conspiracy. An analysis of the particular instances cited by the plaintiffs indicates a complete lack of proof that the terms which they received were the result of any illegal combination or conspiracy.

Plaintiffs urge, for example, that the contract terms for the film "T-Men" were discriminatory. Defendants countered with the argument that the contract for the showing of "T-Men" was not for that film alone but was for the showing of two Eagle Lion films on the same program "T-Men" and "Out of the Blue"; and that from a business standpoint, the licensing arrangements were proper and appropriate. The Court cannot determine, in the abstract, what would have been a fair rental arrangement for these two films. Certainly, there is no proof that the contract arrangement was arrived at as a result of any agreement or understanding of the defendants or that the terms were the result of any combination or conspiracy of the defendants. For example, the plaintiffs offered no evidence of any selling efforts that they made to place these films elsewhere; they offered no evidence that they had attempted to secure an arrangement from RKO or any other circuit for these films.

Plaintiffs urged also that the films "Black Book" and "Trapped" were not shown by the defendants. However, the testimony shows that while one of the defendants was actually negotiating for these films, plaintiffs themselves sold the pictures for a first neighborhood run on another circuit not controlled by either defendant.

Here, again, the argument of the plaintiffs that they received discriminatory terms for the licensing of their films is not supported by any evidence sufficient to lead the Court to conclude that the terms agreed upon were the result of any illegal combination or conspiracy among the defendants. Whether the terms were the result of a poorer quality of the films or inferior selling efforts of the plaintiffs, or were the result of a preference of the defendants to take other films which were then available, is not established by the evidence. Plaintiffs, who had the burden of proof, certainly did not prove that any of these terms were the result of any illegal combination or conspiracy, nor did they establish that Eagle Lion films were denied an opportunity to be played upon the circuits of the defendants. In fact, as has been pointed out, all Eagle Lion films which had a national gross rental of $500,000 or more were actually shown upon the circuits of the defendants; and the Eagle Lion films which had a national rental of less than $500,000 derived a higher ratio of returns from the metropolitan New York area than they did from the national area when compared to similar low revenue films of the eight major distributors.

The Court finds as a fact that plaintiffs have failed to prove exclusion of their films by the defendants; that plaintiffs have failed to prove any conspiracy on the part of the defendants to exclude the plaintiffs from the opportunity of licensing their feature motion pictures on a competitive basis to the Loew's and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway; and that plaintiffs have failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis.

The Court concludes that this lack of proof is not cured by the mere decree in the *Paramount* case and that the complaint should, therefore, be dismissed. *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629 (C. A. 2, 1952), cert. den. 344 U. S. 875 (1952).

I therefore direct entry of judgment for the defendants dismissing the complaint, with costs.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Should either party desire enumerated or additional findings, they may be proposed upon notice to the other side at any time within ten days after the date of this order.

Dated: New York, N. Y.
June 11, 1956

ARCHIE O. DAWSON
U. S. D. J.